Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 97-237
Beehive Telephone Company, Inc.	)	
Beehive Telephone, Inc. Nevada	)	
	)	Transmittal No. 6
Tariff F.C.C. No. 1	)	

ORDER ON RECONSIDERATION

Adopted: May 6, 1998; Released: May 6, 1998

By the Commission:

I. Introduction

1. On February 5, 1998, Beehive Telephone Company, Inc. (Beehive) filed a petition for reconsideration of the *Beehive Tariff Investigation Order.*[1] Beehive seeks reconsideration of the rate prescriptions and refund requirements.[2] AT&T Corp. (AT&T) filed an opposition[3] and Beehive filed a reply.[4] For the reasons discussed below, we grant Beehive's petition, in part, and deny Beehive's petition, in part.

II. Background

2. Beehive filed Transmittal No. 6, in 1994, pursuant to section 61.39 of the Commission's rules.[5] As a cost schedule carrier serving fewer than 50,000 access lines,

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[1] Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada, Transmittal No. 6, CC Docket 97-237, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998) (*Beehive Tariff Investigation Order*).

[2] Petition for Reconsideration, filed February 5, 1998 (*Beehive Petition).*

[3] Opposition to Petition for Reconsideration, filed February 19, 1998 (*AT&T Opposition*).

[4] Reply to Opposition to Petition for Reconsideration, filed March 3, 1998 (*Beehive Reply*).

[5] 47 C.F.R. § 61.39. Prior to 1994, Beehive charged the interstate local switching rates filed by the National Exchange Carrier Association (NECA) on behalf of incumbent local exchange carriers (LECs) that participate in NECA's traffic-sensitive access tariff.

Beehive elected to file Transmittal No. 6 pursuant to Section 61.39 of the Commission's rules.[6] Section 61.39 requires cost schedule carriers that make changes to traffic sensitive and common line rates to support their rates with cost-of-service studies based on historic costs and demand.[7] Cost schedule carriers also must file the following information when they make changes to end user common line rates: (1) a cost-of-service study; (2) estimates of how the changes affect the traffic and revenues for the service; and (3) estimates of how any changes to a service affect the traffic and revenues of the carrier's overall services.[8] The rates of incumbent LECs subject to cost-of-service regulation may not reflect a rate of return that exceeds 11.25%.[9] Under our rules, the Commission may generally "require any carrier to submit such information as may be necessary for review of a tariff filing."[10]

3. On January 6, 1998, the Commission released the *Beehive Tariff Investigation Order,*[11] concluding its investigation of the rates filed by Beehive in its 1997 annual access tariff. The Commission concluded that Beehive's premium and non-premium local switching access rates filed in its 1997 annual access tariff were unjust and unreasonable. The Commission found that Beehive's local switching rates reflected an unexplained sharp increase in operating costs and corporate expenses in 1995 and 1996 without commensurate increases in plant investment and business operations.[12] The Commission also found that the rate of return Beehive used in calculating its rates was unjust and unreasonable because it exceeded the prescribed overall rate of return of 11.25%. The Commission prescribed rates for Beehive's premium and non-premium local switching charge based on an 11.25% return and total operating expenses equal to 25% of Beehive's total plant in service (TPIS). The Commission disallowed Beehive's operating expenses in excess of 25% of its TPIS because this ratio closely approximates both Beehive's ratio in 1994 and 1995, and the average ratio

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[6] Local exchange carriers with fewer than 50,000 access lines may elect to file their access tariffs under Section 61.39 of the Commission's rules. LECs that file their access tariffs under Section 61.39 may elect to be classified as either "cost schedule" or "average schedule" carriers. "Cost schedule" carriers file rates based on their historic cost of service. *See* 47 C.F.R. § 61.39.

[7] 47 C.F.R. §§ 61.39(b)(1), 61.39(b)(3).

[8] 47 C.F.R. § 61.39(b)(5).

[9] *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 89-624, 5 FCC Rcd 7507 (1990) (*Rate of Return Represcription Order*), *recon.*, 6 FCC Rcd 7193 (1991), *aff'd, Illinois Bell Telephone Co. v. FCC*, 988 F.2d 1254 (D.C. Cir. 1993); *see also*, 47 C.F.R. § 61.39(c).

[10] 47 C.F.R. § 61.39(a).

[11] In the Matter of Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada, Transmittal No. 6, CC Docket 97-237, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998) (*Beehive Tariff Investigation Order).*

[12] *Beehive Tariff Investigation Order*, 13 FCC Rcd at 2741 (para. 14).

among LECs serving a similar number of access lines.[13] The Commission prescribed a premium local switching rate of $0.009443 per minute and a non-premium local switching rate of $0.004249 per minute.

4. The *Beehive Tariff Investigation Order* directed Beehive to refund the difference between the actual local switching revenues it obtained between August 6, 1997 and December 31, 1997 and the local switching revenues that it would have obtained during this period based on the rates prescribed by the Commission, plus interest. On January 9, 1998, Beehive submitted its refund plan,[14] and, on January 20, 1998, the Bureau approved Beehive's refund plan.[15]

III. Discussion

A. Calculation of Demand

5. As a preliminary matter, we agree with Beehive's argument in its petition that we should use 55,585,464 minutes of use as demand, which represents Beehive's total 1995/1996 interstate premium and non-premium access minutes.[16] In the *Beehive Tariff Investigation Order*, we rejected that figure, which Beehive had advanced in its rebuttal, and instead prescribed 59,484,566, as reported by Beehive in its supplemental direct case because, among other things, Beehive had failed to provide any information in support of the revision in its rebuttal and Beehive had failed to provide an explanation as to why the minutes of use reported in its supplemental direct case differed from the minutes of use reported in its rebuttal.[17] On reconsideration, Beehive clarifies that the 55,585,464 figure reported in its rebuttal case represented total 1995/1996 interstate access minutes, while the figure reported

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[13] *See* Universal Service Fund (USF) 1997 Submission of 1996 Study Results by the National Exchange Carrier Association, Inc., October 1, 1997; Universal Service Fund (USF) 1996 Submission of 1995 Study Results by the National Exchange Carrier Association, Inc., October 1, 1996; Universal Service Fund (USF) 1995 Submission of 1994 Study Results by the National Exchange Carrier Association, Inc., October 1, 1995.

[14] Letter from Russell D. Lukas, Counsel for Beehive, to James D. Schlichting, Common Carrier Bureau, Chief of the Competitive Pricing Division, dated January 9, 1998; Letter from Russell D. Lukas to James D. Schlichting, dated January 12, 1998.

[15] In the Matter of Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada, Transmittal No. 6, CC Docket 97-237, Order, DA 98-333 (Com. Car. Bur., Com. Pric. Div., released February 20, 1998) (*Beehive Refund Plan Order*).

[16] Beehive Petition at 18.

[17] *Beehive Tariff Investigation Order* at 10 (para. 23).

in its supplemental direct case represented total dial equipment minutes.[18] Because Beehive's interstate local switching rates should reflect total interstate access minutes for 1995 and 1996, not total dial equipment minutes, we accept 55,585,464 minutes as the measure of Beehive's demand for the purpose of calculating interstate local switching rates. Although AT&T has argued that we should not accept Beehive's reporting of interstate access minutes in its rebuttal, AT&T has provided no information to support its assertion that this measure is incorrect.[19] Accordingly, we grant Beehive's petition in part.

6. We authorize Beehive to recalculate its premium and non-premium local switching rates for the period of August 6, 1997 through December 31, 1997, based on its actual 1995/1996 premium and non-premium access minutes. This recalculation results in a premium local switching rate of $0.010106 per minute of use and a non-premium switching rate of $0.004548 per minute of use. Moreover, Beehive may revise its rates within ten days of the effective date of this Order to include a surcharge for the purpose of recovering from its customers the difference between the amounts that were refunded to Beehive's customers and the amount that should have been refunded due to the correction we authorize by this Order. The tariff revision must state that the surcharge will end in three months. Beehive may collect this amount from its customers through a surcharge in three equal installments over a three month period.

B. Due Process

1. Notice and Comment

7. Beehive makes several arguments in support of its position that it was deprived of due process by the Bureau's *Beehive Designation Order*.[20] We will address these arguments *seriatim*.

8. First, we reject Beehive's first argument, that the Bureau deprived it of its statutory right to a full hearing by allowing fewer than 30 days to file its direct case.[21] As a preliminary matter, we note that Beehive had 13 days to file its direct case with the Commission. We find that 13 days, in combination with the Commission's acceptance of supplemental data during the two-week period after its direct case was filed, afforded Beehive

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[18] Beehive Petition at 18.

[19] *See* AT&T Opposition at 14-15.

[20] Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada, Transmittal No. 6, CC Docket No. 97-237, Order Designating Issues for Investigation, 12 FCC Rcd 20249 (1997) (*Beehive Designation Order*).

[21] Beehive Petition at 6.

an adequate opportunity to present its case.[22]

9. Section 204(a) does not require the Bureau, acting under delegation, to allow each carrier involved in a tariff investigation the same amount of time with regard to pleading cycles. In fact, the Bureau has the flexibility under Section 204(a) to tailor each tariff investigation individually to ensure that each investigation is completed within the statutorily-mandated five month period.[23] Contrary to Beehive's contention that this deadline was a departure from the Bureau's normal practice of giving carriers 30 days to file their direct cases,[24] the Bureau does not have an established policy or rule governing the specific length of time that must be allowed for pleading cycles.[25] In the *Tariff Streamlining Order,* for example, we declined to establish rules or to set periods for pleading cycles, noting that the procedures governing tariff investigations are established in the orders designating the issues.[26] In this instance, the Bureau established a reasonable time period for Beehive to file its direct case. We note that Beehive argued in its motion for an extension of time to file its direct case that 15 days is the standard amount of time the Commission provides carriers to file their direct cases.[27]

10. In Beehive's case, we find that Beehive should have been able to produce the information requested by the Bureau within the time allowed because the record demonstrates that the information requested in the *Beehive Designation Order* is the type of information that small telephone companies like Beehive are required to keep readily available for prompt submission to the Commission pursuant to our rules. Small companies that elect to file tariffs pursuant to Section 61.39(b) of the Commission's rules must prepare information in

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[22] Beehive was initially provided 10 days to file its direct case and was granted an additional three days after it filed a motion for extension of time. Beehive alleges that it was initially given nine days to file its direct case because the *Beehive Designation Order* was released on December 3, 1997 instead of December 2, 1997 and the filing schedule on page one of the order directed Beehive to file its direct case on December 12, 1997. This assertion is incorrect. The record shows that the Order was released on December 2, 1997 and the Bureau granted Beehive's motion for an extension of time giving Beehive a total of 13 days, until December 15, 1997, to file its direct case. Moreover, Beehive acknowledges in its motion for an extension of time that it received actual notice on December 2, 1997. Beehive Motion at 2 (para. 4).

[23] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 97-23, Report and Order, 12 FCC Rcd 2170, 2222 (para. 106) (1997) (*Tariff Streamlining Order*).

[24] Beehive Petition at 6.

[25] *See* AT&T Opposition at 7-8.

[26] *Tariff Streamlining Order*, 12 FCC Rcd at 2220-2222 (paras. 103, 106).

[27] *See* Beehive Motion for an Extension of Time at 4.

support of the transmittal filing, including an explanation of the filing.[28] Although it is not necessary for local exchange carriers that file under this section to submit the supporting information at the time the transmittal letters are filed, these companies "should be prepared to submit the data *promptly* upon reasonable request by the Commission or interested parties."[29]

11. In addition, the Commission's Uniform System of Accounts requires telephone companies to keep financial records such as those requested by the *Beehive Designation Order* "with sufficient particularity to show fully the facts pertaining to all entries in the accounts" and to file the records "in such a manner as to be *readily accessible* for examination" by the Commission.[30] The *Beehive Designation Order* directed Beehive to provide information from its Part 32 accounts, and cost and demand information in support of its transmittal, including revenue requirement information and minutes of use. This is the type of information that Beehive is required to keep readily available for examination and prompt submission to the Commission upon reasonable notice.[31] Beehive failed to present an argument in its Petition as to why this type of information could not be produced within the 13-day period.

12. Furthermore, we accepted all information that Beehive filed after the deadline for filing its direct case. This includes Beehive's rebuttal and two supplemental filings. Beehive filed one supplemental filing on December 16, 1997 and the other on December 17, 1997. Beehive also filed new information on the recalculation of its demand in its reply to AT&T's opposition to its direct case, which we considered in the *Beehive Tariff Investigation Order*.[32] Accordingly, Beehive took the opportunity to supplement its direct case from December 3, 1997 through December 29, 1997, a 27-day period.

13. Further, Beehive contributed to the delays in this proceeding by filing its biennial access tariff late in violation of the Commission's rules. Section 61.58 of the Commission's rules require that access tariff filings for a biennial period must be made on at

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[28] 47 C.F.R. § 61.39(b).

[29] *Id.* (emphasis added). The data requested by the Bureau also should have been readily available because it was the subject of a previous data request made by an interested party. On May 29 and on July 16, 1997, AT&T requested additional cost and demand data regarding Beehive's 1997 interstate annual access filing. Beehive responded to AT&T's request for information on August 27, 1998, but Beehive failed to provide sufficient cost and demand data to allow for a determination that its traffic sensitive rates were just and reasonable. Accordingly, Beehive had approximately 6 months' notice that the type of information requested in the order should be prepared and made available to support its 1997 interstate annual access filing.

[30] 47 C.F.R. § 32.12(b).

[31] *Beehive Designation Order*, 12 FCC Rcd at 20252 (para. 7).

[32] *See* para. 5 *supra*.

least 15 days' notice and must be effective on July 1, 1997.[33] In order to be effective on July 1 with adequate notice, Beehive's access tariff filing was required to be filed on June 16, 1997. Beehive filed its tariff on July 22, 1997, which not only gave Beehive additional time to prepare the cost data to support its initial tariff filing, but also created a lag in the ordinary time period for access tariff filings. It is true that other carriers received 30 days to file their direct cases, as Beehive argues. Because Beehive filed late, we were unable to review Beehive's tariff concurrently with the tariffs filed by other LECs and could not include Beehive in the *Annual Access Tariff Designation Order*, released on July 28, 1998, which specifies the issues to be investigated for the other LECs.[34] We require all LECs to file their annual and biennial tariffs effective July 1 of each year so that we can review all the LECs' tariffs together. It is important that LECs file their tariffs on time so that we can efficiently review all tariff filings concurrently, because the Telecommunications Act of 1996 allows the Commission no more than five months to conduct a tariff investigation under Section 204(a) of the Communications Act (Act). Beehive was the only carrier to file its tariff late. Because Beehive was the only carrier to file its tariff late, the time period for review of its tariff was necessarily shortened. As discussed below, however, the shortened time period did not foreclose Beehive's opportunity to fully participate in this proceeding.

14. Beehive's second argument is that the Commission deprived Beehive of an opportunity to participate "meaningfully" in the proceeding because the Bureau did not comply with Section 204(a) of the Act when it set short deadlines and made procedural errors in the *Beehive Designation Order.*[35] Beehive contends that the short deadlines precluded the Commission staff from engaging in discussions with Beehive's representatives to obtain information essential to resolving the issues raised in the investigation and that companies are ordinarily allowed to present evidence after the filing deadlines have passed. We find this argument is rendered moot by the Commission's consideration of two supplemental documents Beehive filed after the deadline for filing the direct case had expired.[36] Further, although *ex parte* presentations are permitted in a tariff investigation, neither Beehive nor any other carrier is entitled to discuss with the Commission staff the results of a Commission tariff investigation before the Commission itself has decided the issues. A carrier's obligation to tariff just and reasonable rates and its potential liability for refunds when it fails to do so are

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[33] 47 C.F.R. § 69.3(f).

[34] *1997 Annual Access Tariff Investigation*, Order Designating Issues for Investigation, 12 FCC Rcd 11417 (Com. Car. Bur. 1997).

[35] Beehive Petition at 2-3.

[36] On December 16, 1997, Beehive filed a supplement to its direct case which included its 1994, 1995 and 1996 cost and revenue in Table 1 of FCC ARMIS Report 43-01 format. On December 17, 1997, Beehive filed a second supplement including its combined 1995 and 1996 costs and revenue in Table 1 of FCC ARMIS Report 43-01 format and a chart showing Beehive's DEM minutes by jurisdiction for 1994, 1995 and 1996. *See Beehive Tariff Investigation Order*, 13 FCC Rcd at 2738 (para. 7, 8, 23, and 24).

not contingent on the receipt of guidance from the Commission staff during the course of a subsequent investigation.[37]

15. Third, Beehive asserts that it was denied due process in that it did not receive notice of the case against it and did not receive the opportunity for rebuttal. We reject this argument. The Bureau first provided Beehive with notice that Transmittal No. 6 raised significant questions of lawfulness when it released the *Beehive Tariff Suspension Order*.[38] In that Order, the Bureau stated that it was initiating an investigation into whether Beehive's Transmittal No. 6 "(1) is unreasonably discriminatory in violation of Section 202(a) of the Communications Act, and (2) contains any unjust and unreasonable charge, practice, classification, or regulation in violation of Section 201(b) of the Communications Act."[39] The Bureau specifically stated that it is "not persuaded based on the present record that Beehive has shown that its proposed rate levels are justified under existing rules governing its interstate access charges."[40]

16. Beehive also received notice in the *Beehive Tariff Designation Order*, where the Bureau designated in greater detail the issues that were to be investigated in this proceeding.[41] The Bureau stated that "Beehive failed to provide complete cost data for 1995 and 1996," and that it is, therefore, not possible to determine whether Beehive's proposed switching rates are reasonable.[42] As a result, the Bureau required Beehive to submit "detailed cost data for calendar years 1994, 1995, and 1996. . . ."[43] It is noteworthy that the *Beehive Tariff Designation Order* was very specific about the information Beehive was required to file to justify its rates. Furthermore, the Bureau put Beehive on notice that:

> Pursuant to Section 204(a) of the Act and Commission's rules, Beehive's provision of the information requested is necessary to determine whether the proposed rates are just and reasonable. Failure to provide this information may result in the prescription of

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[37] 1997 Annual Access Tariff Filings, CC Docket 97-149, Memorandum Opinion and Order on Reconsideration, FCC 98-52 at 6 (para. 10)(rel. March 31, 1998).

[38] *Beehive Telephone Company, Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, CC Docket No. 97-237, Suspension Order, DA 97-674 (Com. Car. Bur., Comp. Pric. Div., rel. August 5, 1997) (*Beehive Tariff Suspension Order*).

[39] *Id.* at para. 6.

[40] *Id.*

[41] Pursuant to 47 C.F.R. § 1.102, the designation order was effective the date that it was released.

[42] *Beehive Designation Order*, 12 FCC Rcd at 20253 (para. 8).

[43] *Id.* at 20252 (para. 7).

rates that are just and reasonable.[44]

17. Beehive argues that the Bureau failed to provide Beehive with the opportunity to explain the increases in its operating costs in 1995 and 1996. This argument fails, however, because the *Beehive Tariff Designation Order* required Beehive to provide the following information for 1994, 1995, and 1996: all investment, expense, and revenue account balances that show the interstate and intrastate amounts for each cost category of Part 32 of the Commission's rules and for each access charge category in Part 69 of the Commission's rules. Beehive also was required to show the development of the revenue requirement for the local switching category for the local switching rate. In connection with these data, the Bureau specifically required Beehive to provide "an explanation and data supporting any *changes in costs and demand from year to year.*"[45] Beehive was thus given the opportunity, but simply failed, to explain the operating cost increases.

18. Beehive also argues that, under the Administrative Procedure Act (APA) and the Due Process Clause of the Fifth Amendment, we were required to give Beehive the opportunity to comment on the specific methodology we employed to make our rate prescription at the conclusion of the tariff investigation. We reject this argument. The *Beehive Tariff Designation Order* provided Beehive notice that its rates may not be just and reasonable and that we might prescribe rates in this proceeding.[46] The courts have recognized that, when we determine that a rate is unjust and unreasonable under Section 201(b) of the act, we have broad discretion under Section 205(a) of the Act to prescribe a rate that is just and reasonable. Section 205(a) provides in pertinent part that, whenever "after full opportunity for hearing, . . . the Commission shall be of opinion that any charge . . . of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge."[47]

19. Courts have consistently found in the Act a Congressional intent to grant us broad discretion in "selecting methods . . . to make and oversee rates."[48] In doing so, we may

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[44] *Id.* at 20252-20253 (para. 8).

[45] *Id.* at 20252 (para. 7) (emphasis added).

[46] *See Beehive Designation Order*, 12 FCC Rcd 20253 (para. 8).

[47] 47 U.S.C. § 205(a).

[48] *MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982) (quoting *Aeronautical Radio v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981)). *See also Western Union Int'l v. FCC*, 804 F.2d 1280, 1292 (D.C. Cir. 1986) ("The FCC's judgment about the best regulatory tools to employ in a particular situation is . . . entitled to considerable deference from the generalist judiciary."); MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241, 259 (1983) ("[A]

make any "reasonable selection from the available alternatives."[49] Rather than insisting upon a single regulatory method for determining whether rates are just and reasonable, courts and other federal agencies with rate authority similar to our own evaluate whether an established regulatory scheme produces rates that fall within a "zone of reasonableness."[50] For rates to fall within the zone of reasonableness, the agency rate order must constitute a "reasonable balancing" of the "investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates."[51] Moreover, our discretionary authority to prescribe rates based in part on averaging is directly supported by the Supreme Court's decision in the *Permian Basin Area Rate Cases.*[52] In that decision, the Court upheld the Federal Power Commission's (FPC) decision to depart from its former practice of determining the reasonableness of natural gas producers' rates by examining the costs of each company on a case-by-case basis.[53]

20. In this investigation, we found that Beehive's operating expenses were unjust and unreasonable under Section 201(b) of the Act because those expenses were unusually high and Beehive failed to provide adequate cost support for those high expenses. Accordingly, we made a prescription on the basis of reasonable surrogate data. We calculated the average ratio of operating expenses to TPIS among companies with a comparable number of access lines to Beehive in 1995 or 1996 by using data filed with NECA. We compared this average to Beehive's reported operating expenses in 1994, 1995, and 1996. After making this comparison, we prescribed a 25% ratio of operating expenses to TPIS. This ratio exceeded the average among LECs that are comparable to Beehive (21.55%) and exceeded Beehive's ratio in 1994 and 1995 (23.55% and 24.03% respectively). We find that our decision represented a "reasonable selection from the available alternatives."[54] We considered prescribing the average or the mean for comparable LECs, but decided that our prescription

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prescribed rate is just and reasonable for purposes of Section 205(a) if it represents the best approximation of a rate that satisfies all statutory requirements that this Commission is capable of devising within a reasonable period of time.").

[49] *MCI Telecommunications,* 675 F.2d at 413.

[50] *See, e.g., FERC v. Pennzoil Producing Co.,* 439 U.S. 508, 517 (1979); *AT&T v. FCC,* 836 F.2d 1386, 1390 (D.C. Cir. 1988) (quoting *Jersey Cent. Power & Light v. FERC,* 810 F.2d 1168, 1177 (D.C. Cir. 1987)). *See also Wisconsin v. FPC,* 373 U.S. 294, 309 (1963); *FPC v. Natural Gas Pipeline Co.,* 315 U.S. 575, 585-86 (1942).

[51] *Jersey Cent. Power & Light,* 810 F.2d at 1177-78. *See Pennzoil Producing,* 439 U.S. at 517 (to fall within the zone of reasonableness, rates must be neither "less than compensatory" nor "excessive.").

[52] 390 U.S. 747 (1968).

[53] *Id.* at 768-70.

[54] *MCI Telecommunications,* 675 F.2d at 413.

would produce a more reasonable result if we were to base it in part on data we had available from Beehive. Because this prescription reflects both the average ratio among companies that are comparable to Beehive and Beehive's ratio for both 1994 and 1995, this approach ensures that Beehive's rates fall within a zone of reasonableness.

21. Beehive also contends that the Commission's use of the cost-averaging methodology was erroneous because our review of Beehive's rates must be based on data filed pursuant to Section 61.39 of the Commission's rules, which allows cost schedule carriers to develop their rates based on a company's actual historical costs.[55] We agree with AT&T's statement that where a carrier has not met its burden of proving that their rates are just and reasonable, the Commission has full and complete authority to rely on industry average costs in setting rates.[56] While Beehive may elect to set rates based on Section 61.39 of the Commission's rules, as discussed above, the Commission is not restricted by that election in selecting the methodology it will use when the LEC has failed to justify its rates. In this investigation, we evaluated all of the filings made by Beehive pursuant to Section 61.39 of the Commission's rules and found that Beehive had failed to justify its high operating expenses under the requirements of that section. As explained above, in light of Beehive's failure to justify its high operating expenses, we have the discretionary authority to prescribe rates using any methodology that results in just and reasonable rates.

22. In addition, Beehive argues that our rate prescription is inconsistent with *National Black Media Coalition v. FCC* because, in making our rate prescription, we allegedly used critical, unpublished data to reach our conclusions and did not take all the relevant factors into account in this proceeding.[57] Contrary to Beehive's assertion, we did not use unpublished data to make our prescription. In the *Beehive Tariff Investigation Order*, we prescribed local switching rates for Beehive on the basis of (1) publicly available unseparated data filed with NECA by companies with 800 to 1,000 lines in 1995 or 1996 and (2) data filed on the record by Beehive. Moreover, we fully explained the methodology we used to make a prescription so that parties could verify the validity of the prescription.[58]

23. Beehive also asserts that we do not have the authority to prescribe rates based

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[55] Beehive Petition at 11.

[56] AT&T's Opposition at 9.

[57] *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1024 (2d. Cir. 1974).

[58] *See Beehive Tariff Investigation Order*, 13 FCC Rcd at 2742-2745 (paras. 17-25). Beehive also cites *Ohio Bell Telephone Company v. Public Utilities Comm'n*, 301 U.S. 292, (1937), for the proposition that it would violate due process if an agency's decision is based on undisclosed evidence that was never made part of the record. This case is easily distinguishable from this proceeding because in the *Beehive Tariff Investigation Order* we used public information to prescribe a reasonable operating cost to TPIS ratio and we clearly explained the methodology that was used to make this prescription.

upon industry average costs in this case because the investigation was a "quasi-judicial" proceeding. It is not clear what Beehive means when it characterizes this investigation as "quasi-judicial." If Beehive is asserting that this investigation was an adjudication, we reject this argument. In fact, a tariff investigation is not an adjudication. The Commission has previously determined that a tariff investigation "is a rulemaking of particular applicability" under the Administrative Procedure Act.[59] As explained above, we provided Beehive with full notice and numerous opportunities to comment before we made our rate prescription.

24. Beehive states the Commission erred by giving dispositive weight to industry average costs because Beehive is a higher than average cost carrier due to its low density of access lines per route mile and per exchanges.[60] As AT&T argues in its opposition, we accounted for the possibility that Beehive's costs may be higher than the carriers in the sample.[61] We did not simply prescribe the average ratio of operating expenses to TPIS; we compared the average to Beehive's reported operating expenses in 1994, 1995, and 1996, and we prescribed a ratio of operating expenses to TPIS that exceeded the average and exceeded Beehive's ratios in 1994 and 1995.[62] Accordingly, we will not grant reconsideration of this issue.

25. Finally, Beehive claims that our rate prescription fails to permit Beehive to receive just compensation for local switching services under the Due Process and Takings clauses of the Fifth Amendment. It is well established that "he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. . . ."[63] Notwithstanding this requirement, Beehive failed to provide any evidence supporting its assertion that the prescribed rate was so low as to constitute an uncompensated taking. Therefore, we reject this argument.

C. Consideration of Additional Evidence

26. We further reject Beehive's request that we consider additional evidence included in its petition for reconsideration. Beehive argues that the direct case filing deadline precluded it from presenting all of its cost and demand data and from commenting on Staff's study conducted on unseparated NECA data. Citing alleged errors in the *Beehive Designation*

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[59] *See e.g.,* Cincinnati Bell Telephone Company Tariff FCC No. 35, Memorandum Opinion and Order, 8 FCC 4409, n.55, *citing* 5 U.S.C. § 551(4).

[60] Beehive Petition at 15-16.

[61] AT&T Opposition at 10.

[62] *Beehive Tariff Investigation Order* at 7 (para. 18).

[63] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 605 (1944).

Order, Beehive contends that the Bureau failed to give Beehive explicit notice of the direct case deadline, which contributed to Beehive's inability to present all of its cost and demand data. Beehive argues that it was prejudiced by the lack of notice and, therefore, the record should be reopened to allow it to provide additional information.[64] As discussed above, we believe that Beehive was given sufficient notice, based on the circumstances of this case, to present all evidence that was relevant to its case. We find that Beehive has not presented any convincing arguments that it could not have provided these data during the course of the investigation.

27. We also decline to allow Beehive to introduce new information in this proceeding, based on our rules regarding the introduction of new evidence on reconsideration. Under Section 405(c) of the Communications Act and Section 1.106(c) of the Commission's rules, parties filing petitions for reconsideration are permitted to rely on facts not previously submitted in a particular proceeding only if: (1) facts or circumstances have changed since the last opportunity to present such matters;[65] (2) the facts were unknown to the petitioner until after its last opportunity to present such matters, and could not, through the exercise of due diligence, have been learned prior to such opportunity;[66] or (3) the Commission determines that reliance on such facts is required in the public interest.[67]

28. Beehive maintains that it should now be permitted to introduce evidence to show that its total operating expense to TPIS ratio is an anomaly because it leases switching equipment in four of its exchanges, which it booked as an operating expense.[68] Beehive also argues that its operating expenses were high because of high legal fees and an increase in administrative expenses due to Beehive's efforts to stimulate traffic on its network. We find that Beehive has failed to satisfy the requirements of Section 405(c) of the Communications Act and Section 1.106(c) of the Commission's rules. Beehive has not argued that the "new information" described in its petition occurred after Beehive filed its direct case or that this information was not known to Beehive at the time it filed its direct case. Even if we were inclined to consider the information Beehive presented for the first time in its petition, we agree with AT&T's argument that Beehive's petition does not provide any documentation to support its assertion that its high ratio of operating expense to TPIS reasonably reflects the

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[64] Beehive Petition at 12.

[65] 47 C.F.R. §§ 1.106(c)(1), (b)(2)(i); 47 U.S.C. § 405(c). Section 405(c) of the Communications Act provides that "no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should be taken on any reconsideration." 47 U.S.C. § 405(c).

[66] 47 U.S.C. § 405(c); 47 C.F.R. §§ 1.106(c)(1), (b)(2)(ii).

[67] 47 U.S.C. § 405(c); 47 C.F.R. § 1.106(c)(2).

[68] Beehive Petition at 19-21.

fact that it is leasing switching equipment in four of its exchanges, and that it had high legal expenses, and increased administrative expenses associated with its efforts to increase network usage.[69] We decline, therefore, to consider this new information on reconsideration.

IV. Ordering Clauses

29. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 201(b), 204(a), and 205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 201(b), 204(a), and 205, that the petition for reconsideration filed by Beehive Telephone Company, Inc. IS HEREBY GRANTED IN PART AND DENIED IN PART as discussed above.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[69] AT&T Opposition at 11-12.